Supreme Court, U.S.
FILED

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No. 94 912

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHARLES HARRIS, SCOTT JARVIS, RAYMOND COAD, LARRY YOUNGMAN, and BRIAN ALLEN,
Petitioners,

v.

FREDERICK DAVIDSON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH*
Chief Counsel for Litigation

JAMES R. LAYTON
Appellate Counsel

DENISE LEANNE THOMAS
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Counsel for Petitioners

*Counsel of Record

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

34 pp

QUESTION PRESENTED

Whether *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) and its progeny require defendants in a federal civil jury trial to exercise their peremptory strikes of prospective jurors so as to always strike the white venireperson and never strike the minority venireperson, where both prospective jurors share characteristics which defendants deem unfavorable.

STATEMENT PURSUANT TO RULE 14.1(b)

The names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are not found in the caption of this Petition for Writ of Certiorari. Defendants/appellees Charles Harris, Scott Jarvis, Raymond Coad, Larry Youngman, and Brian Allen have filed the instant Petition for Writ of Certiorari. Defendants/appellees Margaret Ellis, Paul Delo, and Dr. Pedro Cayabyab are not parties to the instant proceeding.

The defendants/appellees to the proceedings below are petitioners herein; the plaintiff/appellant below is respondent herein.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 14.1(b)	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdictional Statement	1
Statutes and Constitutional Provisions Involved	2
Statement of the Case	2
Reasons Why the Writ Should be Granted	8
I. The court of appeals' opinion holding that a party exercising a peremptory strike must remove a white venireperson instead of a black venireperson with identical characteristics conflicts with clear decisions of this Court holding that the party asserting a *Batson* challenge must prove purposeful discrimination against black venirepersons	8
II. The court of appeals' decision that the exercise of a peremptory strike against a black venireperson who possesses the same characteristics as a white venireperson on the venirepanel, standing alone, creates a presumption of discrimination against the black juror is contrary to the rule followed in at least four other circuits	12

III. The court of appeals' *de novo* use of a comparative juror analysis to determine that where a party struck a black venireperson while not exercising a strike as to a white venireperson with the same characteristics a *Batson* violation must be presumed improperly isolated one factor and did not give proper deference to the district court's finding that there was no *Batson* violation 14

Conclusion 17

Appendix

Appendix A
Judgment of the United States Court of Appeals for the Eighth Circuit, dated July 21, 1994. ..... A-1

Appendix B
Order of the United States Court of Appeals for the Eighth Circuit granting the Motion to Dismiss of Defendants/Appellees Ellis, Cayabyab, and Delo, dated January 4, 1994. ..... A-6

Appendix C
Order of the United States District Court for the Eastern District of Missouri entered in accordance with jury verdict, dated September 24, 1992 ..... A-7

Appendix D
Order of the United States District Court for the Eastern District of Missouri denying Plaintiff's Motion for New Trial, dated June 29, 1993 ..... A-8

TABLE OF AUTHORITIES

Page(s)

Cases:

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) ..... *passim*

Burks v. Borg, 27 F.3d 1424 (9th Cir. 1994) 15

Doss v. Frontenac, 14 F.3d 1313 (8th Cir. 1994) 11

Edmundson v. Leesville Concrete Company, Inc., ___ U.S. ___, 111 S.Ct. 2077 (1991) 11

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859 (1991) 2,9,17

J.E.B. v. Alabama, ___ U.S. ___, 114 S.Ct. 1419 (1994) 2,10,14

Lewis v. United States, 146 U.S. 370, 13 S.Ct. 138 (1892) 11

People v. Johnson, 47 Cal.3d 1194, 255 Cal.Rptr. 569, 767 P.2d 1047 (1989), *cert. denied*, 494 U.S. 1038, 110 S.Ct. 2196 (1990), *rehearing denied*, 495 U.S. 941, 110 S.Ct. 2196 (1990) 15,16

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991) 10

Reynolds v. Benefield, 931 F.2d 506 (8th Cir. 1991) 10

United States v. Alvarado, 951 F.2d 22 (2d Cir. 1991) ... 13

United States v. Brown, No. 93-3966, 1994 WL 487865 (7th Cir. Sep. 12, 1994) 12

United States v. Joe, 787 F.Supp. 548 (E.D.Va. 1992), *aff'd*, 989 F.2d 496 (4th Cir. 1993) 13

United States v. Lane, 866 F.2d 103 (4th Cir. 1989)..... 13

United States v. Lewis, 837 F.2d 415 (9th Cir. 1988), *cert. denied*, 488 U.S. 923, 109 S.Ct. 304 (1988) 13

United States v. Scott, 26 F.3d 1458 (8th Cir. 1994).....2,10,15

Constitutional Provisions:

United States Constitution, Fourteenth Amendment..... 2,4

Statutes:

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 2

28 U.S.C. §1343 2

28 U.S.C. §1870 10,11

42 U.S.C. §1983 1,3

Rules:

United States Supreme Court Rule 14.1(b) ii

Other:

4 W. Blackstone, *Commentaries* 353 11

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OPINIONS BELOW

The United States District Court for the Eastern District of Missouri entered judgment for defendants in accordance with a jury verdict on September 24, 1992. Appendix C. The United States Court of Appeals for the Eighth Circuit reversed the judgment in an opinion dated July 21, 1994. Appendix A.

JURISDICTIONAL STATEMENT

Plaintiff Frederick Davidson brought this action pursuant to 42 U.S.C. 1983. The jurisdiction of the district court was based

upon 28 U.S.C. §§1331 and 1343. On September 24, 1992, the United States District Court for the Eastern District of Missouri entered judgment in accordance with the jury verdict in favor of defendants Charles Harris, Scott Jarvis, Raymond Coad, Larry Youngman, and Brian Allen. Plaintiff filed his motion for new trial on October 5, 1992, and the district court denied that motion on June 29, 1993.

Plaintiff filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit on July 29, 1993. On January 26, 1994, the Eighth Circuit entered its Order reversing and remanding the case to the United States District Court for the Eastern District of Missouri for a new trial of plaintiff's claims against defendants Harris, Jarvis, Coad, Youngman, and Allen. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, section 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case reflects the uncertainty still prevalent in the lower courts in administering the standards for jury selection set out in this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859 (1991), and most recently, *J.E.B. v. Alabama*, ____ U.S. _____, 114 S.Ct. 1419 (1994). In the case at bar, the Eighth Circuit relied on the recent precedent of *United States v. Scott*, 26 F.3d 1458, 1466 (8th Cir. 1994) that "[i]n this circuit, . . . [a litigant] may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged," to impose a *per se* rule regarding jury selection. The Eighth Circuit now requires a party always to exercise its peremptory strike

against a non-minority venireperson when two or more venirepersons — including at least one minority — share a common trait, otherwise race and gender neutral, that the party deems undesirable. This petition presents the Court with the opportunity to clarify conflict among the circuits created by the decision of the Eighth Circuit, and to provide guidance that is required to prevent needless additional constraints on the jury selection process, unnecessary new trials and the resulting strains upon the resources of the pressed district courts.

A. *Procedural History.*

On March 12, 1991, Frederick Davidson ("the inmate") filed the instant action pursuant to 42 U.S.C. §1983, alleging that during his incarceration at the Potosi Correctional Center ("PCC"), defendants Scott Jarvis, Larry Youngman, Raymond Coad, Charles Harris, and Brian Allen used excessive force against him; that defendants Paul Delo and Charles Harris failed adequately to supervise the subordinate corrections officers; and that defendants Dr. Pedro Cayabyab and Margaret Ellis subsequently failed adequately to minister to his medical needs. The inmate claimed such actions violated his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and sought actual and punitive damages of $1,000,000.

On September 23 and 24, 1992, these claims were tried before a jury, with the Honorable Jean C. Hamilton presiding. Voir dire and jury selection took place on September 23, 1992. During jury selection, defendants exercised their peremptory challenges to remove three black venirepersons. The inmate objected, citing *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). Judge Hamilton overruled that objection after a hearing. On September 24, 1992, Judge Hamilton sustained the motion for judgment as a matter of law of defendants Margaret Ellis, Paul Delo, and Dr. Pedro Cayabyab. Later that same day, the district court entered judgment in accordance with the jury verdict in

favor of defendants Harris, Jarvis, Coad, Youngman, and Allen and against the inmate on all of the inmate's remaining claims.

The inmate filed his motion for new trial on October 5, 1992. The trial court denied the motion by endorsement on October 14, 1992.[1] Plaintiff filed his notice of appeal on July 29, 1993.

B. *The Batson Challenge.*

The inmate asserted, *inter alia*, that defendants had used their peremptory challenges to strike black persons from the venire in violation of his right to equal protection under the Fourteenth Amendment to the United States Constitution.

The voir dire proceedings at issue may be summarized as follows. The jury panel consisted of sixteen persons. In his brief before the United States Court of Appeals for the Eighth Circuit, plaintiff asserted that of the sixteen, twelve were white and four were black. Plaintiff, however, failed to preserve the ethnicity of the individual jurors in the voir dire transcript; he asserted the specific racial complexion of the jury panel for the first time in his motion for new trial. The list of the jury venire, filed by plaintiff under seal in his appeal, did not reveal the racial makeup of the jury.

Following questioning of the venirepersons by Judge Hamilton and counsel for plaintiff and defendants, the parties proceeded to exercise their peremptory challenges, Judge Hamilton announced for the record that plaintiff struck Jurors 5, 8, and 13, and

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[1] Due to a clerical error, however, the court's order was not immediately docketed and the parties were not promptly notified of the court's ruling. The order denying the motion for new trial was later entered on the docket, but the docket entry was erroneously dated October 14, 1992. In view of the confusion, on June 29, 1993, the district court *sua sponte* entered its order both vacating the previous order of October 14, 1992, denying plaintiff's motion for new trial, and denying plaintiff's motion for new trial filed October 5, 1992.

defendants struck Jurors 6, 7 and 11. Counsel for plaintiff then stated:

> Your Honor, the defendants have stricken three blacks and I just want to make an objection under *Batson*. I think they're required to state their reason for striking those individuals.

Eighth Circuit Appendix (Transcript of Voir Dire), p. 199. Counsel did not elaborate upon her objection. She failed to state the total number of black venirepersons or the number of blacks, if any, remaining on the panel, and articulated no facts supporting her objection, other than the circumstance that three black persons were stricken. At Judge Hamilton's prompting, defendants' counsel nonetheless furnished his racially neutral reasons for his peremptory challenges, as follows:

> The reason on Gwendolyn Jones [Juror No. 6] [is] ...the fact that she is a mother with three children, and we think that she would be somewhat sympathetic to an incarcerated young man, like Mr. Davidson is. Mr. Kirksy [sic] [Juror No. 7] was on a criminal jury and is also the father of several children that are approximately the same age as the defendant [sic]. Mrs. Pargo [Juror No. 11] . . . has apparently a work record but has an unemployed spouse, and again children about the same age, and she had some prior civil jury experience across the street, which we don't know exactly what her experience was, whether good or bad experience, but those are the reasons predominantly because these are people who have children, approximately the same age, and they're going to be sympathetic to incarceration.

Eighth Circuit Appendix, p. 200 (Transcript of Voir Dire). Plaintiff's counsel briefly reiterated her objection, contending that Jurors 1 and 4 also had children approximately the same age.

The district court overruled the objection, finding the reasons to be racially neutral, and the case then proceeded to trial.

After the jury reached a verdict in favor of the defendants, the inmate appealed the overruling of his *Batson* objection. The court of appeals was required to reach two questions: (1) whether the issue and the underlying factual predicates were adequately preserved; and, (2) if so, whether the trial court's determination that the reasons given by the defendants' counsel for his choices in exercising peremptory challenges were not based on the venirepersons' race.

Without anything more than a conclusory statement, the court of appeals first determined that the inmate had preserved an adequate record. The court apparently relied on the inmate's representations as to the racial makeup of the venire, despite the fact that there is no record evidence supporting those representations.

The court of appeals then addressed the question of the reasons for the exercise of the peremptory challenges. It held that the race neutral explanation proffered by defendants' counsel for striking Juror 6, Ms. Jones, was pretextual as a matter of law, because "defendants did not strike two white venirepersons who also had young children." App. A, at 4. The court did not further explain its conclusion; rather, it reiterated that "[b]ecause the defendants did not apply their theory for striking Jones consistently to strike white venirepersons with characteristics identical to Jones, the defendants' explanation for striking Jones was pretextual." *Id.* at 5. In reaching this conclusion, the court gave no weight to defendants' argument that the juror list revealed that the children of the two white venirepersons were, in general, either much younger or much older than the children of the jurors stricken by defendants' counsel. Having so ruled, the court declined to consider plaintiff's *Batson* challenges to the defendants' remaining strikes, but reversed and remanded the cause to

the district court for new trial. Thus, the Eighth Circuit held that as soon as defendants struck *one* black venireperson while the venire contained a white prospective juror with supposedly similar characteristics, the equal protection clause was violated.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE COURT OF APPEALS' OPINION HOLDING THAT A PARTY EXERCISING A PEREMPTORY STRIKE MUST STRIKE THE WHITE VENIREPERSON INSTEAD OF THE BLACK VENIREPERSON WITH IDENTICAL CHARACTERISTICS CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT THE PARTY ASSERTING A *BATSON* CHALLENGE MUST PROVE PURPOSEFUL DISCRIMINATION AGAINST BLACK VENIREPERSONS.

The principle necessarily drawn from the Eighth Circuit's opinion is that a party exercising a peremptory strike must remove the white venireperson, and cannot strike the black venireperson, where the two possess the same (gender and race-neutral) undesirable characteristic. The only rationale given by the court for its conclusion was that the defendants' strike of a black juror, because she had young children, failed to "pass muster" because the defendants "did not strike two white venirepersons who also had young children." App. A, at 4. The court thus implicitly held that because the defendants were concerned about the presence of having parents of small children on the jury, they were *required* to exclude a white venireperson.

The Eighth Circuit did not, as the inmate may contend, limit its ruling to a mere requirement that where two jurors both possess a perceived unfavorable characteristic, the party seeking to strike one of the jurors must explain why the black juror, instead of the white juror, was removed from the panel. The court instead formulated a mandatory rule, which in an attempt to exclude peremptory strikes based on race, has the reverse result of requiring that race be taken into account.

The result of the Eighth Circuit's holding is to eliminate the requirement that a party asserting an Equal Protection claim demonstrate "purposeful discrimination." This Court held in

Herndandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 1866 (1991):

> "[P]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," [and] "discriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected ... a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. (Citations omitted.)

But the court of appeals did not purport to address the question of intent, choosing instead to presume intent when a party chooses to exclude a minority venireperson whenever a white venireperson has the same characteristic.

The Eighth Circuit's opinion is also contrary to this Court's ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1723 (1986), that in evaluating an equal protection challenge to the striking of a juror all relevant circumstances must be considered, including a pattern of strikes removing black persons, or remarks or questions by the party exercising the strikes.

The court of appeals never reached the question of whether there was a pattern of strikes that would suggest a racial motivation. Instead, it concluded that a single decision, choosing to exercise a strike as to a black rather than a white venireperson, was sufficient basis for reversing the district court's finding. Again, that rule would eliminate the requirement that the challenging party must show a discriminatory purpose in the exercise of peremptory challenges. In effect, it creates an irrebuttable presumption of discrimination when a party strikes a black juror if a white juror with similar characteristics remained on the panel after all peremptory strikes were exercised. In its opinion, the Eighth Circuit relied on its prior opinions stating that "[i]n this circuit, it is well established that [a litigant] may not justify

peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged." App. A, at 4, quoting *United States v. Scott*, 26 F.3d 1458, 1466 (8th Cir. 1994), quoting *Reynolds v. Benefield*, 931 F.2d 506, 512 (8th Cir. 1991). In the view of the court of appeals, the exercise of such a challenge, standing alone, constitutes an Equal Protection violation.

The creation of such an irrebuttable presumption of discrimination, without the necessary showing of discriminatory intent, itself violates the Equal Protection Clause. *Batson* was never intended to be an affirmative action regulation requiring that African-Americans or other minorities be given preference during jury selection. It is intended to bring about a race-neutral jury selection process. By holding that it is unconstitutional to strike the black venireperson when there is a similarly situated white venireperson, the Eighth Circuit's ruling would have the perverse effect of skewing a race neutral selection. *See Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991).

Not only is this ruling in conflict with prior precedent of this Court, the Eighth Circuit's decision is another step in the erosion of the peremptory challenge, a path deplored by four members of this Court in *J.E.B. v. Alabama*, ___ U.S. ___, 114 S.Ct. 1419, 1430 (1994) (O'Connor, J., concurring), (Scalia, J., dissenting, Rehnquist, C.J., and Thomas, J., joining). The peremptory strike, codified at 28 U.S.C. §1870, is "'a practice of ancient origin' and is 'part of our common heritage.'" *Id.* at 1430 (O'Connor, J., concurring) (citation omitted). Its objective was described by Justice O'Connor:

> The purpose of this longstanding practice is to establish for each party an arbitrary and capricious species of challenge whereby the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and

> gestures of another may be acted upon. By allowing the litigant to strike jurors for even the most subtle of discerned biases, the peremptory challenge fosters both the perception and reality of an impartial jury.

Edmundson v. Leesville Concrete Company, Inc., ___ U.S. ___, 111 S.Ct. 2077, 2090 (1991) (O'Connor, J., dissenting), quoting *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 138 (1892), quoting 4 W. Blackstone, *Commentaries* 353. In his dissent in *J.E.B*, Justice Scalia stated:

> [T]he peremptory challenge system . . . loses its whole character when (in order to defend against "impermissible stereotyping" claims) "reasons" for strikes must be given. The right of peremptory challenge "'is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'"

(Citations omitted.) Perhaps not surprising in view of its ruling in this case, recently, the Eighth Circuit not only employed the "concept of 'comparability'" in considering the pretextual nature of racially neutral reasons for peremptory strikes to conclude that there was no successful *Batson* challenge on appeal, but the court went so far as to suggest that it supported the elimination of peremptory strikes entirely. *See Doss v. Frontenac*, 14 F.3d 1313, 1317, n.3 (8th Cir. 1994). The court of appeals has thus continued down a road that leads inexorably to the elimination of any peremptory challenges against minority venirepersons. That, however, is a policy decision for the United States Congress. So long as peremptory challenges are mandated by 28 U.S.C. §1870, courts should not be permitted to eviscerate their use by adopting rules unsupported by the Constitution.

II. THE COURT OF APPEALS' DECISION THAT THE EXERCISE OF A PEREMPTORY STRIKE AGAINST A BLACK VENIREPERSON WHO POSSESSES THE SAME CHARACTERISTICS AS A WHITE VENIREPERSON ON THE VENIREPANEL, STANDING ALONE, CREATES A PRESUMPTION OF DISCRIMINATION AGAINST THE BLACK PERSON, AND IS CONTRARY TO THE RULE FOLLOWED IN AT LEAST FOUR OTHER CIRCUITS.

Other courts of appeals have refused to follow the path chosen by the Court of Appeals for the Eighth Circuit, thus creating a conflict among the rules in the various circuits.

As noted above, the Eighth Circuit examined in isolation Juror 6's status as a mother, and concluded that because at least two other white venirepersons were also mothers, the striking of Juror 6, who was black, violated the Equal Protection principles of *Batson* as a matter of law. The court declined to address the combination of characteristics possessed by Juror 6, and the defendants' use of their remaining peremptory strikes to remove other jurors believed unfavorable to the defendants.

That approach conflicts, first, with the direction taken by the Seventh Circuit in *United States v. Brown*, No. 93-3966, Slip Op. at 1, 1994 WL 487865 (7th Cir. Sep. 12, 1994). That court held:

> Defendants may point to nearly any combination of features claiming pretext. While a combination of characteristics may at times combine to eliminate some from the venire who happen to be members of a racial group, standing alone such a result cannot translate into a conclusion that the strike was racially motivated.

Thus, in the Seventh Circuit, the evidence on which the Eighth Circuit relied here, "standing alone . . . cannot" lead to the finding of a *Batson* violation.

The decision at issue also conflicts with *United States v. Lewis*, 837 F.2d 415, 417 n.5 (9th Cir. 1988), *cert. denied*, 488 U.S. 923, 109 S.Ct. 304 (1988). There, the Ninth Circuit specifically stated:

> [T]he defendant claims that discriminatory intent is demonstrated because the prosecutor failed to strike other veniremen possessing some of the same characteristics that she cited as justifications for striking the black venireman. We recognize, however, that the decision whether to strike a venireman hinges upon the interplay of various factors and that no unchallenged juror possessed all the cited characteristics.

Other courts have reached the same result. *Accord United States v. Joe*, 787 F.Supp. 548, 552 (E.D.Va. 1992), *aff'd*, 989 F.2d 496 (4th Cir. 1993) (Fourth Circuit precedent "strongly suggests" that a "'divide and conquer' strategy" for reviewing strikes of jurors is inappropriate, citing *United States v. Lane*, 866 F.2d 103 (4th Cir. 1989)). *See also United States v. Alvarado*, 951 F.2d 22, 25 (2d Cir. 1991) (rejecting *Batson* challenge when two venirepersons shared same trait, stating that "[d]ecisions in other circuits have observed that an explanation for a peremptory challenge, though weakened, is not automatically to be rejected simply because it applies to a nonminority venireperson who was not challenged.").

Here, in contrast, the court of appeals declined to address the "interplay of various factors," instead choosing a *per se* rule requiring the use of peremptory challenges to exclude white, in preference to minority, venirepersons.

The Eighth Circuit's application of a contrary rule further fractures the body of law governing peremptory strikes follow-

ing *Batson*[2], and will necessarily engender yet more post-trial motions and appeals, as litigants struggle to reconcile the differing application given to this Court's principles set forth in *Batson* and its progeny. Losing parties will find in the Eighth Circuit rule a basis for pressing additional limitations on the use of peremptory strikes. Where a party succeeds in convincing a reviewing court that the Eighth Circuit's *per se* rule establishing a Batson violation should be applied and was not followed by the parties and presiding judge at trial, time-consuming and costly retrials will ensue.

III. THE COURT OF APPEALS' *DE NOVO* USE OF A COMPARATIVE JUROR ANALYSIS TO CONCLUDE THAT WHERE A PARTY STRUCK A BLACK VENIREPERSON WHILE NOT EXERCISING A STRIKE AS TO A WHITE VENIREPERSON WITH THE SAME CHARACTERISTICS, A *BATSON* VIOLATION MUST BE PRESUMED IMPROPERLY ISOLATED ONE FACTOR AND DID NOT GIVE PROPER DEFERENCE TO THE DISTRICT COURT'S FINDING THAT THERE WAS NO *BATSON* VIOLATION.

The Eighth Circuit employed a comparative analysis of the venirepersons to reverse the district court's *Batson* ruling. That is, the court of appeals independently scrutinized a characteristic of a venireperson who was struck and compared it with the characteristics of those who were not to determine that the defendants' explanation for striking Juror 6, who was black, was pretextual. Counsel for the inmate did not develop the record to demonstrate why the offered explanation was a pretext for

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[2] Another example of the fractures developing in the body of *Batson* authority was the split in the circuits and among the states regarding whether or not *Batson* applied to gender discrimination, which was recently healed by this Court in *J.E.B.*.

discrimination. *Cf. United States v. Scott*, 26 F.3d 1458 (8th Cir. 1994). Yet, as noted in *Burks v. Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994), this Court has not yet embraced such an analysis on appellate review of *Batson* rulings, nor should it do so.

An appellate court should not conduct such an inquiry on its own, and instead should "give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." *People v. Johnson*, 47 Cal.3d 1194, 1220, 255 Cal.Rptr. 569, 578, 767 P.2d 1047, 1056 (1989), *cert. denied*, 494 U.S. 1038, 110 S.Ct. 2196 (1990), *rehearing denied*, 495 U.S. 941, 110 S.Ct. 2196 (1990). The court explained:

> The dissent's use of comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, a particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently

> less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the venirepersons.

Johnson, 255 Cal. Rptr. at 578-579, 47 Cal. 3d at 1220, 767 P.2d at 1056-1057. Certainly, to review the necessarily intangible aspects of jury selection from a paper record is something quite different from review by the trial court. The trial court was able to observe the venire, had knowledge of the composition of the panel and was aware of those aspects of selection criteria that counsel may find difficult to express on the cold, hard record to which the appellate court is restricted.

The practical result of the Eighth Circuit's comparative analysis theory is that a party may no longer exercise his peremptory strikes in a meaningful manner, to effect what he perceives as a jury most favorably disposed (or, at a minimum, least unfavorably disposed) to his cause. He may not prioritize among venirepersons sharing a single undesirable characteristic, combining deliberation concerning that characteristic with other aspects of each juror's qualifications to determine who, or how many, to exclude based on that particular consideration. Nor can he prioritize a number of jurors' characteristics, to achieve what he believes to be a fair representation on the venirepanel. Instead, in order to withstand a *Batson* challenge, he must remove all venirepersons who possess a single perceived undesirable trait — for example, parents of young children — and may have no peremptory strikes remaining to remove persons he deems unfavorable for other reasons, such as prior jury service. That outcome, now mandated in the Eighth Circuit, is not required by the Equal Protection Clause, and results in evisceration of the time-honored practice of the peremptory strike.

CONCLUSION

The Eighth Circuit ruled that where two venirepersons share similar characteristics, and one venireperson is white and the other is black, any party exercising a peremptory strike must strike the white juror, or face an irrebuttable presumption of discrimination. This conflicts with this Court's decisions in *Hernandez* and *Batson*, as well as the Equal Protection Clause and common sense. The decision also conflicts with rulings of at least four other courts of appeals. In application, the Eighth Circuit's holding would virtually eliminate the peremptory strike as an effective litigation practice, and would result in discrimination against white venirepersons. For these reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH*
Chief Counsel, Litigation Division

JAMES R. LAYTON
Appellate Counsel

DENISE LEANNE THOMAS
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
(314)751-3321

ATTORNEYS FOR PETITIONERS

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3055EM

Frederick Davidson,

Appellant,

v.

Charles Harris, C.O.I.; Scott Jarvis, C.O.I.;
Raymond Coad, C.O.I.; Larry Youngman, C.O.I.;
Dean Allen,

Defendants-Appellees,

Margaret Ellis, Medical Assistant; Paul Delo;
Pedro Cayabyab,

Defendants.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 18, 1994

Filed: July 21, 1994

Before FAGG, Circuit Judge, BRIGHT, Senior Circuit Judge,
and WOLLMAN, Circuit Judge.

FAGG, Circuit Judge.

Frederick Davidson, a black Missouri inmate, brought this 42 U.S.C. § 1983 action alleging various prison officials, guards, and a doctor (collectively the defendants) violated Davidson's Eighth Amendment rights by using excessive force against him and ignoring his serious medical needs. After a trial, a jury returned a verdict for the defendants. Davidson appeals, contending the defendants improperly excluded blacks from the jury in violation of the Equal Protection Clause. *See Batson v.*

Kentucky, 476 U.S. 79 (1986). Because we agree, we reverse and remand.

When Davidson's case came to trial, the venire panel contained twelve white persons and four black persons. During voir dire, the district court asked the panel general questions and allowed the parties to ask individual jurors specific questions. The defendants asked no specific questions of prospective black jurors Jones, Williams, or Pargo. Following voir dire, the district court struck black prospective juror Stowers for cause. The defendants then used their three peremptory strikes to remove the remaining three blacks: Jones, Williams, and Pargo. Davidson objected to the defendants' removal of the three black jurors under *Batson*.

Without deciding whether Davidson had established a prima facie case of discrimination in the use of peremptory strikes, the district court asked the defendants to state the reasons for their strikes. The defendants responded that they struck Jones because she is the mother of three children and would be sympathetic to a young man like Davidson. The defendants struck Williams because he is the father of children approximately the same age as Davidson and earlier served on a criminal jury. The defendants struck Pargo because she has children about the same age as Davidson, earlier civil jury experience, and an unemployed spouse. The defendants summarized that it used it [sic] strikes "predominantly because these are people who have children, approximately the same age, and they're going to be sympathetic to incarceration."

In making his *Batson* objection, Davidson pointed out that jurors on the final panel who were not stricken shared identical characteristics with the three stricken black jurors. In particular, Davidson noted jurors McClain and Rekart are also the mothers of children approximately the same ages as Jones's [sic] children. Without making any findings, the district court overruled Davidson's *Batson* objection. We review the district court's

implicit ultimate finding that no discrimination occurred for clear error. *Elem v. Purkett,* No. 93-1793, 1994 WL 233771, at *3 (8th Cir. June 1, 1994).

Initially, the defendants contend that because the voir dire transcript and juror information list do not reveal the venire members' races, the record on appeal is insufficient to support Davidson's *Batson* claim. We disagree. The voir dire transcript shows that the three stricken jurors were black and in Davidson's new trial motion, Davidson represented that the final jury panel before the district court was all white. The district court clerk included the motion in the record on appeal and Davidson included the motion without objection in the appendix. *See* Fed. R. App. P. 10(a), 30(a). Although the defendants complain that the new trial motion is not part of the record, the defendants do not contend Davidson's motion does not "truly disclos[e] what occurred in the district court" under Rule 10(e). Rather than moving to strike the motion or modify the record, the defendants did not dispute Davidson's representation of the venire's racial composition in the district court, nor do defendants challenge the accuracy of Davidson's factual assertions on appeal. Because the parties do not dispute Davidson's assertion of the venire's racial composition before the district court, we need not remand for a record clarification under Rule 10(e) and will consider Davidson's assertion as part of the record on appeal. *See United States v. Alverson,* 666 F.2d 341, 348 n.6. (9th Cir. 1982).

We note at the outset that in *Edmonson v. Leesville Concrete Co.,* 111 S.Ct. 2077, 2080 (1991), the Supreme Court held *Batson* applies to private litigants in civil cases because "race-based exclusion violates the equal protection rights of the challenged jurors." Under *Edmonson,* Davidson may raise the excluded persons' rights on his behalf. *Id.* at 2087. To establish a *Batson* claim, Davidson was first required to make a prima facie showing that the defendants exercised their peremptory strikes on the basis of race. *United States v. Brooks,* 2 F.3d 838,

840 (8th Cir. 1993), *cert. denied,* 114 S. Ct. 1117 (1994). Because the defendants offered race-neutral explanations for their strikes and the district court ruled on the ultimate question of intentional discrimination, however, the preliminary prima facie issue falls from the case. *Id.* at 840-41. Thus, we are left to decide whether the defendants' explanations are pretextual. *Id.*

"'[I]n this circuit, it is well established that [a litigant] may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics are also challenged.'" *United States v. Scott,* Nos. 93-2331, 93-2333, 1994 WL 261807, at *7 (8th Cir. June 16, 1994) (*quoting Reynolds v. Benefield,* 931 F.2d 506, 512 (8th Cir.), *cert. denied,* 501 U.S. 1204 (1991)). A party can establish an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken. *Walton v. Caspari,* 916 F.2d 1352, 1361-62 (8th Cir. 1990), *cert. denied,* 499 U.S. 931 (1991); *Garrett v. Morris,* 815 F.2d 509, 514 (8th Cir.), *cert. denied,* 484 U.S. 898 (1987).

In this case, the defendants' explanation for striking Jones — because she had young children, she would be sympathetic to a young man like Davidson — does not pass muster under our case law. The record shows the defendants did not strike two white venirepersons who also had young children. White juror Rekart had three children almost the same ages as Jones's [sic] children. *See Jones v. Ray,* 987 F.2d 960, 973 (3d Cir. 1993) (prosecutor's explanation that he struck black jurors with children the same age as defendant was pretextual because prosecutor did not strike white jurors with children about the same age).

Further, the defendants' strike of Jones appears suspect given the defendants asked no questions of Jones to verify whether her mere status as the mother of young children engendered sympathy for prisoners. There is nothing in the record to indicate that

Rekart and McClain were not equally or more sympathetic than Jones because of their motherhood. *See Scott*, 1994 WL 261807, a *8 (government must fully develop record to substantiate juror strikes based on subjective justification). Because the defendants did not apply their theory for striking Jones consistently to strike white venirepersons with characteristics identical to Jones, the defendants' explanation for striking Jones is pretextual. *See Walton*, 916 F.2d at 1362. Thus, we conclude the district court's denial of Davidson's *Batson* objection was clearly erroneous.

Having concluded that the defendants struck Jones in violation of *Batson*, we need not consider Davidson's challenges to the defendants' remaining strikes. We reverse and remand to the district court for a new trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3055EMSL

Frederick Davidson,
Appellant,

vs.

Charles Harris, etc., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellees' Paul Delo, Pedro Cayabyab and Margaret Ellis motion to dismiss the appeal as it pertained to them is hereby granted. The appeal shall proceed as to the other appellees.

January 26, 1994

Order Entered Under Rule 27B(a):
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CASE NUMBER - 91-503C(7)

FREDERICK DAVIDSON,
PLAINTIFF,

VS.

CHARLES HARRIS, SCOTT JARVIS, RAYMOND COAD, LARRY YOUNGMAN and BRIAN ALLEN,
DEFENDANTS.

JUDGMENT

[Filed: Sept. 24, 1992]

This action came on for trial before the Court and a jury, Honorable Jean C. Hamilton, District Judge, presiding, the issues having been duly tried, the jury having rendered its verdict as to defendants Charles Harris, Scott Jarvis, Raymond Coad, Larry Youngman and Brian Allen, and the Court having sustained defendants' Margaret Ellis, Paul Delo and Pedro Cayabyab motion for judgment at law at the close of plaintiff's case,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by his cause of action against defendants, that the action be dismissed on the merits, and that the defendants recover of the plaintiff their costs of action.

ROBERT ST. VRAIN, CLERK

BY: /s/ Sherry Compton
Deputy Clerk

Dated this 24 day of September, 1992

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 91CV0503

FREDERICK DAVIDSON,
Plaintiff,

v.

CHARLES HARRIS, et al.,
Defendants

ORDER

[Filed: June 29, 1993]

This matter is before the Court sua sponte. This matter was tried before the Court and a jury on September 23 and 24. On September 24, 1992, the Court sustained the motion of Defendants Ellis, Delo and Cayabyab and Judgment as a Matter of Law. On the same date, the jury returned a verdict for the remaining Defendants.

On October 5, 1992, Plaintiff filed his Motion for a New Trial. The Court denied the motion by endorsement on October 14, 1992. However, due to a clerical error, the Court's Order was not immediately docketed and the parties were not immediately notified of the Court's ruling. The Order denying the Motion for New Trial has since been entered on the docket. However, the docket entry erroneously indicates that the Order was docketed on October 14, 1992.*

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* The file stamp on the ruled document indicates that the Motion was denied on October 14, 1993. The Court will treat this obviously meaningless notation as void.

Fed. R. Civ. P. 60(b)(6) provides in pertinent part:

> Upon motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (6) any . . . reason justifying relief from the operation of the judgment.

Upon consideration of the matter, the Court finds that the confusion attending the docketing of the Order denying Plaintiff's Motion for a New Trial justifies relief from the operation of that judgment insofar as the record reflects that the Order was docketed on October 14, 1992.

ACCORDINGLY,

IT IS HEREBY ORDERED that the Court's Order of October 14, 1992 denying Plaintiff's Motion for a new Trial is VACATED.

IT IS FURTHER ORDERED that Plaintiff's Motion for a New Trial, filed on October 5, 1992, is DENIED.

Dated this 29th day of June, 1993.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE